IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921.

No. 553.

OSCAR LESER, ET AL.,

VS.

J. MERCER GARNETT, ET AL.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

The application for a writ of certiorari in this case, the Record having been transmitted upon writ of error, is made as a matter of caution.

The petitioners already had sued out a writ of error under Section 237 of the Judicial Code as amended by the Act of Congress approved September 6, 1916, which provides for the "re-examination and reversal or affirmance of any final judgment or decree in any suit in the highest Court of the State * * * where is drawn in question * * * the validity of a statute or an authority exercised under any State on the ground of their being

repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of their validity."

In this case the defendants, the Board of Registry for the Seventh Precinct of the Eleventh Ward of Baltimore City, acting as officials of, and therefore under authority of, the State of Maryland, undertook to enforce the so-called Nineteenth Amendment to the Constitution, by registering two women voters who were not entitled to be registered under the Constitution of the State of Maryland. The validity of this authority so exercised was drawn in question by the petitioners, themselves residents, voters and citizens of the State of Maryland, on the ground that the said alleged Nineteenth Amendment was not such an amendment as was authorized to be either proposed by Congress or ratified by the Legislatures of three-fourths of the States, but was actually in effect prohibited by Article V of the Constitution of the United States, and the decision of the Court of Appeals of Maryland was nevertheless in favor of the validity of the said authority (although such decision was based purely and solely upon the ground that that Court felt constrained, by the supposed precedent of the Fifteenth Amendment, not to consider the arguments against the validity of the Nineteenth).

We understand the defendants in error to contend, however, that no writ of error will lie in this case, and out of abundant caution we therefore pray that a writ of certiorari be issued.

The right to grant a writ of certiorari in any event will seem to be clear under the latter clause of Section 237, which provides for the granting of such a writ in case where any right, privilege or immunity is claimed under the Constitution by either party, and the decision of the

State Court is for or against said claim, as shown in our petition.

It is submitted that unless this Court shall pursue the course frequently adopted where, as here, there are a writ of error and a petition for certiorari pending in the same case, and hear both questions at the same time, it should now grant the writ of certiorari for the following reasons:

1. This case will present to this Court for the first time on its merits, the question as to whether or not there is *any* limit to the power to adopt amendments to the Constitution delegated by the people in adopting the original Constitution to certain agents, viz, the two Houses of Congress and the Legislatures of three-fourths of the States. For it is obvious that if this delegated amending power goes so far as to authorize these agents to change the electorate of a State in one way, it would authorize its change in any other way, and it would be impossible to draw any line short of a change which would practically destroy the State itself by placing all its powers of government in the hands of a selected few to whom alone the privilege of voting might be restricted, or in the hands of any people or class of people upon whom the State itself had not seen fit to confer the right of voting.

2. This case also presents the question as to whether or not such an amendment as the Nineteenth, whereby the exclusive right to vote for United States Senators is taken away from the men of the State—the people upon whom the State itself has seen fit to confer that exclusive right, and the right so to vote conferred upon an equal or greater number of women, is not in effect expressly forbidden by Article V.

Article V, while authorizing the proposing by Congress and the ratification by the Legislatures of three-fourths of the States of amendments in general terms, contains one express proviso and prohibition, viz, that no amendment shall be adopted by these agents whereby "a State *without its consent* shall be deprived of its equal suffrage in the Senate." This prohibition was intended to be perpetual so far as the exercise of this power by these agents, to wit, Congress and the State Legislatures, was concerned. It was intended to be a perpetual, irrevocable guarantee to the States of equal representation in the Senate by Senators of their own choosing, *and by necessary implication a guarantee in perpetuity that there should remain in each State the power to give or refuse its consent.*

The Nineteenth Amendment, by changing the electorate of the State, deprives the State, *as constituted prior to this amendment*, of the power to give or refuse its consent to any amendment which may hereafter be submitted reducing the number of Senators to which the State shall be entitled, or in any other way destroying its equal right of suffrage in the Senate. It does more. It actually deprives the State, as heretofore existing and constituted under its own laws, of the right to choose Seators, and hence *deprives it directly of its suffrage in the Senate.*

3. The case also presents to this Court for the first time, the question among others, whether or not a Legislature of a State is authorized to ratify an amendment to the Federal Constitution which changes the Constitution or form of government of the State itself, when it is not authorized by the State Constitution to do so directly, or whether such amendments to the Federal Constitution

must be submitted for ratification to a convention of the people.

4. The case also involves the question whether the action of this Court in the case of Myers vs. Anderson, 238 U. S. 368, in refusing to consider any arguments against the validity of the Fifteenth Amendment, which had remained unchallenged and had been in effect acquiesced in and *consented* to by every State in the Union for nearly fifty years, constitutes a precedent for this Court refusing to consider contentions against the validity of other amendments whereby the electorate of a State may be interfered with or abolished, when such State's consent could *not* be imputed to it or presumed.

5. The case also involves the further question as to whether the amendment has, in any event, been ratified in a lawful way by the legislatures of the necessary three-fourths of the States,—it being claimed that in some instances, at any rate, those ratifications were absolutely null and void as being in flagrant disregard of the constitutional provisions of such States regulating the proceedings and limiting the powers of their legislative bodies, and for the further reason that in certain of said legislatures the final vote of at least one House upon the question of the ratification of said amendment was *against* ratification and not in favor thereof, as appears from the Journals of the respective Houses involved, which are found in the Record of this case, and which by the law of the States in question, are final evidence of what action their legislatures actually took in the premises.

It is apparent that none of these questions can be deemed to be settled until passed upon by this Court, and in order that they may be presented fairly on their merits

regardless of any doubt as to whether a writ of error is or is not allowable in this case, the plaintiffs in error have applied for the writ of certiorari.

Respectfully submitted,

WM. L. MARBURY,

For Petitioners.